88-315

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals misinterpret the language and legislative intent of Section 111 of the Clean Air Act in upholding a determination of the Environmental Protection Agency ("EPA") which would prevent States from correcting overly strict emission standards and discourage voluntary pollution control?

2. Did the Court of Appeals usurp the responsibility of the EPA Administrator in making a determination of environmental impact?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner National-Southwire Aluminum Company[1], appellant below, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 1, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed February 1, 1988,

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[1] Pursuant to Supreme Court rule 21 1, the caption to this case sets forth the names of all the parties hereto and therefore will not be repeated herein. Pursuant to Supreme Court Rule 28.1, the following is a list of all parents, subsidiaries, and affiliates of National-Southwire Aluminum Company:

National Aluminum Corporation, a wholly owned subsidiary of National Intergroup, Inc., of Pittsburgh, Pennsylvania, owns 54.5% of National-Southwire Aluminum Company; Southwire Company, of Carrolton, Georgia, owns the remaining 45.5% of National-Southwire Aluminum Company.

upholding a formal determination by the United States Environmental Protection Agency ("EPA") that a change in the operation of an emission control system at Petitioner's aluminum reduction plant would constitute a "modification" of a "stationary source" within the meaning of the Clean Air Act, is set forth at 838 F.2d 835 (6th Cir. 1988) and in Appendix A hereto at page 1a.

EPA's formal determination, issued on September 22, 1986, is set forth in Appendix A hereto at page 19a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for which National-Southwire Aluminum Company seeks review, Appendix A (26a), was dated and entered February 1, 1988. The order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was filed on March 25, 1988, Appendix A (27a), and dated and entered on April 6, 1988. Jurisdiction to review the judgment of the Court of Appeals is conferred on the Supreme Court by the Act of Congress of June 25, 1948, c.646 (62 Stat. 869), section 1254(1) (28 U.S.C. §1254(1)).

STATUTE AND REGULATIONS INVOLVED

The statute involved in this case is Section 111 of the Clean Air Act, 42 U.S.C. §7411, which is set forth in Appendix B hereto at page 28a. The regulations involved in this case are codified at 40 C.F.R. §§60.5, 60.14, 60.22, 60.24 and 60.28, which are set forth in Appendix B at page 38a.

STATEMENT OF THE CASE

Petitioner owns a primary aluminum reduction plant in Hawesville, Kentucky, the operation of which results in the emission of gaseous fluoride. At the time of its construction in 1969, before the passage of the Clean Air Act, Petitioner voluntarily equipped the plant with an emission control system that included wet scrubbers. The scrubbers represented what at that time was believed to be the most effective means of controlling gaseous fluoride emissions and were included as a part of the control system by Petitioner despite the fact that there was no statutory or regulatory requirement to limit gaseous fluoride emissions.

Subsequent to the voluntary control of gaseous fluoride emissions by Petitioner, the EPA adjudged these emissions to be "welfare-related" pollutants which, by definition, "do not pose a threat to human health." Section 111(d) of the Clean Air Act

entrusted regulation of existing sources of such pollutants to the States, subject to EPA approval.[1]

Kentucky adopted standards for gaseous fluoride emissions in 1981, and EPA approved Kentucky's standards in 1982. (3a). These new state standards simply required the same level of emission control that Petitioner had already been achieving by the use of its emission control system with wet scrubbers since 1969.

In 1982, during a routine maintenance-related shutdown of the wet scrubbers, Petitioner's monitors detected no appreciable change in ambient fluoride levels. (4a). Moreover, between 1983 and 1986, Petitioner operated its emission control system without utilization of the wet

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[1] Section 111(d) provides in pertinent part that:

> each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued... but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.

42 U.S.C. §7411(d).

scrubbers pursuant to a variance granted by the Commonwealth of Kentucky. During the approximate three year period in which the variance was in effect Petitioner's monitors again detected no appreciable change in ambient fluoride levels. Petitioner thereupon sought and obtained from Kentucky a relaxation of the State's Section 111(d) fluoride emission standard to permit it to curtail the increasingly costly operation of its wet scrubbers.[2] (4a).

Kentucky submitted a proposed form of its relaxed gaseous fluoride emission standard to the EPA's Region IV office on March 22, 1985. (4a). The proposed regulation included a stipulation that turning off the wet scrubbers to take advantage of the relaxed standard would not be considered a "modification" that would render the plant subject to new source performance standards under the provisions of Section 111(b) of the Clean Air Act. (4a-5a).

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[2] Section 111(a)(1)(c) of the Clean Air Act requires that, in establishing standards of performance for welfare-related pollutants, the States and EPA take into consideration "the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements." 42 U.S.C. §7411(a)(1)(c). In the case of the wet scrubbers, Petitioner incurs annual operating and maintenance costs in excess of $2,200,000.

On June 24, 1986, Region IV endorsed the proposed relaxation of the Kentucky standard in a draft Federal Register notice and technical support document. Region IV concluded, inter alia, (1) that an emission control system with wet scrubbers was "an overly effective means of controlling total fluoride emissions from the plant" (49a), (2) that Petitioner's control system without the wet scrubbers was "an effective means of controlling fluoride emissions (at a reasonable cost)" (49a), and (3) that turning off the scrubbers "will not have a harmful effect on the environment." (51a).

Region IV went on to assert, however, that if Petitioner turned off its scrubbers, it would constitute a "modification" which would subject the plant to federal new source performance standards,[3] which in turn would require the

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[3] The Clean Air Act calls for federal performance standards for all "new sources" of pollution, including "any stationary source, the construction or modification of which is commenced after the publication of regulations... prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. §7411 (a)(2). Modification is defined as "any physical change in, or change in the method of operation of a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §7411 (a)(4).

installation of a prohibitively expensive new emission control system. (52a).

On September 22, 1986, responding to a request filed by Petitioner pursuant to 40 C.F.R. §60.5, the EPA issued a formal determination reiterating the assertion of Region IV that the proposed correction to Petitioner's emission control system would trigger the imposition of new source performance standards. (19a).

Petitioner challenged the EPA determination in a Petition for Review filed in the United States Court of Appeals for the Sixth Circuit on October 27, 1986.[4] Petitioner raised, inter alia, the following arguments before the Court of Appeals:

1) that the proposed operation of Petitioner's emission control system would not constitute a "modification" of an existing facility absent a determination by the EPA Administrator that it would be "less

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4 The Court of Appeals had jurisdiction to review EPA's action pursuant to 42 U.S.C. §7607 (b).

environmentally beneficial" than the present system; and

2) that the imposition of new source performance standards would be inconsistent with the legislative intent behind Section 111 of the Clean Air Act.

On February 1, 1988, the Court of Appeals denied the Petition for Review, Judge Boggs dissenting. (1a). The Court of Appeals held that, because the proposed operation of Petitioner's emission control system without the wet scrubbers would result in an increase in gaseous fluoride emissions, it would necessarily be less environmentally beneficial. (12a). Moreover, the Court of Appeals found that the imposition of new source performance standards would not be inconsistent with legislative intent, because Congress intended in Section 111 simply "to establish existing levels of emissions as a baseline above which an existing source may not pollute without becoming subject to NSPS." (13a).

The Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on March 25, 1988. (27a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision upholding the EPA determination that a State-approved correction in the operation of an emission control system would trigger the imposition of federal new source performance standards will discourage voluntary pollution control and prevent the States from correcting overly strict emission standards for welfare-related pollutants which are inconsistent with the statutory criteria of Section 111(d) of the Clean Air Act. This raises important questions concerning the proper interpretation of Section 111(d) of the Clean Air Act which have not been, but should be, settled by this Court.

The Court of Appeals' unwarranted usurpation of the responsibility of the EPA Administrator to make a determination of the environmental impact of the proposed correction of Petitioner's emission control system represents a substantial departure from the usual course of judicial proceedings, and provides a second reason for granting the writ.

ARGUMENT

I. Important questions are raised by the Court of Appeals' decision which have not been but should be addressed by this Court.

A. The Court of Appeals misinterpreted the language and the legislative intent of Section 111 of the Clean Air Act.

In Section 111 (b) of the Clean Air Act, Congress provided that strict, technology-based new source performance standards of emission control would be applied to all new or newly modified sources of air pollution. By so doing, Congress intended "to address pollution problems when those problems are easiest to fix, at the time of the new construction." (15a).

Congress chose not to impose these strict new source performance standards on existing sources, for whom the expense of retrofitting state-of-the-art control equipment may have been a fatal burden. Rather, in Sections 111(d) and 111(a)(1)(c), Congress provided for the setting of non-health-related emission control standards for existing sources by the States (subject to EPA approval), taking into consideration the cost of achieving emission reduction and any nonair quality health

and environmental impact and energy requirements.

The Court of Appeals decision holding that a correction in the operation of an overly effective and overly costly emission control system would trigger new source performance standards and require the retrofitting of an existing facility with prohibitively expensive new control devices runs completely counter to the statutory scheme of Section 111. Great violence will be done to the legislative intent of this important provision of the Clean Air Act if this decision is allowed to stand.

B. The Court of Appeals decision would prevent a State from correcting overly strict non-health-related emissions standards.

As noted above, Section 111(d) of the Clean Air Act provides that, in establishing non-health-related emission standards for existing sources, "states can decide for themselves what costs they wish to impose for what level of protection of vegetation and inanimate objects." (15a).

Where a State initially establishes a standard it later determines to be overly strict, federal regulations provide a mechanism for the State to

relax that standard, subject to EPA approval. 40 C.F.R. §60.28. In this case, the Commonwealth of Kentucky, taking into consideration the substantial cost of operating Petitioner's scrubbers versus the negligible environmental benefits they provide, determined that its existing standard for gaseous fluoride emissions was overly strict and inconsistent with the statutory criteria of Section 111(d) of the Clean Air Act and should be relaxed. The EPA, taking account of the same factors, proposed to approve Kentucky's relaxed standard (5a-6a); however, its determination that the corrected operation of the scrubbers would trigger new source performance standards defeats the purpose.

Indeed, by effectively preventing a State from correcting an overly strict emission standard, the Court of Appeals decision upholding the EPA determination effectively defeats the legislative intent behind Section 111(d) to give the States the authority to establish and enforce non-health-related emission standards for existing sources.

C. The Court of Appeals decision would discourage voluntary pollution control.

As noted by Judge Boggs in his dissent below, the problems Petitioner and the Commonwealth of

Kentucky face are largely "an accident of timing." (15a). Had Petitioner not voluntarily installed state-of-the-art wet scrubbers in 1969, it might never have been required to do so, since Kentucky might never have adopted the overly strict emission standard which mandated their use.

By preventing Petitioner from correcting the operation of its emission control system, the Court of Appeals decision penalizes Petitioner for having voluntarily installed an overly effective system. Moreover, by effectively preventing the Commonwealth of Kentucky from relaxing its emission standard, the Court of Appeals decision penalizes Kentucky for having initially established an overly strict standard.

This kind of "minnow-trap" enforcement, in the words of Judge Boggs, "creates a national enforcement strategy completely hostile to any willing compliance with pollution control standards." (16a). Such a result could hardly have been intended by Congress.

II. The Court of Appeals usurped the responsibility of the EPA Administrator to make a determination of the environmental impact of the proposed correction of Petitioner's emission control system.

Federal regulations provide that the following shall not constitute a modification of a stationary source under the Clean Air Act:

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

40 C.F.R. §60.14(e)(5) (emphasis added).

The EPA Administrator has not made a determination that the corrected operation of Petitioner's emission control system would result in a system which was "less environmentally beneficial". Indeed, he would have been hard pressed to do so in light of monitoring data which showed no increase in ambient fluoride levels from the corrected operation and in light of his own agency's findings

that the correction would result in no harmful effect to the environment.

The Administrator's failure to make a determination of environmental impact should have been fatal to the EPA determination that the corrected operation of Petitioner's emission control system would constitute a modification of a stationary source. The Court of Appeals' conclusion that, simply because increased emissions would result, the corrected system would necessarily be "less environmentally beneficial" constitutes an unwarranted and indefensible usurpation of the EPA Administrator's responsibility to make that determination, if he can.

CONCLUSION

The Court of Appeals decision misinterprets the language and legislative intent of Section 111 of the Clean Air Act to reach a result which prevents a State from correcting an overly strict emission standard and serves to discourage voluntary pollution control. A writ of certiorari is warranted by the public importance of these concerns and, further, by the Court of Appeals' unwarranted usurpation of the EPA Administrator's unfulfilled responsibility to make a determination of environmental impact.

Respecfully submitted,

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June 23, 1988

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petition for Writ of Certiorari to be mailed first-class, postage prepaid, this 22nd day of June, 1988, upon:

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